UNITED SATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: SEB J. PASSANESI, PRESIDENT, SEB J. PASSANESI, P.C. Respondent.	HUDALJ 92-1835-DB Date Issued: December 16, 1992

Peter R. Huntsman, Esquire
For the Respondent

Linda G. Katz, Esquire
For the Complainant

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. § 24.700 *et seq.* as a result of action taken by the General Deputy Assistant Secretary of the Department of Housing and Urban Development ("the Department" or "HUD" or "the Government") on March 10, 1992, suspending and proposing to debar Respondent from participating in covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts at HUD for a period of three years beginning June 28, 1991, the date HUD's office in Hartford, Connecticut, issued a Limited Denial of Participation against Respondent. The March 10, 1992, action was based on allegations that Respondent had failed to fulfill his contractual obligations in connection with the purchase of window security grilles by the Ansonia Housing Authority in Ansonia, Connecticut.

On March 17, 1992, Respondent filed an appeal and requested a hearing. After the parties filed responsive pleadings, a hearing was held in New Haven, Connecticut, on May 19 and 20, 1992. The last brief was received July 21, 1992.

Findings of Fact

1. Sebastian J. Passanesi or his affiliate, Seb J. Passanesi, P.C., has been a

registered architect in Connecticut since 1938. He received his undergraduate degree from Catholic
University in 1935 and a master's degree from Yale University in 1954. During World War II he served in the U.S. Marine Corps. After the war he remained in the Reserves until about 1958 when he was honorably discharged with the rank of Major. At the time of the hearing he was 81 years old. TR. 163-64, 230, 246.[1]

2. Using financial assistance from HUD, the Ansonia Housing Authority (the "Authority") operates several low-income public housing projects in the Ansonia, Connecticut, area. HUD provides some of its financial assistance in the form of Comprehensive Improvement Assistance Payments ("CIAP") for the purpose of upgrading and modernizing living conditions and correcting physical deficiencies in the projects. 42 U.S.C. § 1437 *et seq.*

3. Respondent has worked on a variety of projects for the Authority since 1961. TR. 167, 168-69.

4. In 1988-89 the Authority embarked on a CIAP project to install security grilles over accessible window openings at three housing projects: the Riverside Project, the Stevens Project, and the Hynes Project. TR. 77; GX. 1. The Authority selected Southern Stoud, Inc., as the contractor to supply and install the grilles. GX. 1, 3.

5. In about November of 1989 the Authority requested Respondent's help in administering the window security grille project. At that time Respondent was providing services to the Authority pursuant to an October 1988 contract, but that contract did not cover the window security grille project. TR. 173-76. The October 1988 contract, entitled "HUD Standard Form of Agreement Between Owner and Architect," was amended in January 1990 to include the grille project. GX. 21, 24.

6. The architectural services contract between Respondent and the Authority provided, *inter alia,* that Respondent would furnish the following services to the Authority:

> [1] Make periodic visits to the site to become familiar with the progress and quality of the construction work on the Project ("Work") and to determine if the Work is proceeding in accordance with the Contract Documents. On the basis of his onsite [*sic*] observations he shall endeavor to guard the Owner against defects and deficiencies in the Work. After each visit, he shall submit a written report to the Owner which shall include all observed deficiencies. A copy of each report shall also be filed at the site. Such visits shall be made by the

[1]The following reference abbreviations are used in this decision: "TR." for "Transcript" and "GX." for "Government's Exhibit."

> Architect or his representative not less than once during each week while construction is in progress including completion of planting and site work designed under this agreement . . . .
>
> [2] Review and recommend to the Owner payment of periodic estimates of the value of acceptable Work in place, and material delivered to and properly stored on site. Based on such observations at the site and on the Contractor's monthly requisitions, the Architect shall review said requisitions. The approval of requisitions shall constitute a representation by the Architect to the Owner based on the Architect's observations at the site and the data comprising the requisition that the Work has progressed to the point indicated; that to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work for conformance with the Contract Documents upon substantial completion, as defined in such Documents, to the results of any subsequent tests required by the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated on the requisition); and that the Contractor is entitled to payment in the amount certified . . . .

GX. 21, items 1.24 i and k.

7. The term "requisition" in paragraph 2 of the architectural services contract refers to a HUD standard form entitled, "Periodic Estimate for Partial Payment" (hereinafter, "periodic estimate"). *See* GX. 1, p. 10. The contractor on a HUD-funded project fills out most of a periodic estimate. When completed it contains a schedule of work items and materials and the value of each as of a specified date. The form also contains the following certification to be signed by an authorized project representative (in this case, Respondent), as well as the contracting officer on behalf of the owner of the project:

> Each of us certifies that he has checked and verified this Periodic Estimate No. ___ ; that to the best of his knowledge and belief it is a true statement of the value of work performed and material supplied by the contractor; that all work and material included in this estimate has been inspected by him or by his authorized assistants; and that such work has been performed or supplied in full accordance with the drawings and specifications, the terms and conditions of the contract, and duly authorized deviations, substitutions, alterations, and additions, all of which have been duly approved. We, therefore, approve as the "Balance Due this Payment" the amount of _____ .

GX. 10-18.

8. According to standard operating procedure, a contractor hired by a public housing authority submits periodic estimates to the authority, which in turns submits them to the architect of the construction project for review and approval. After approval, the architect remands the periodic estimate to the authority, and the authority forwards it to HUD. Upon approval by HUD, the contractor becomes entitled to payment by the authority using CIAP funds. GX. 1, p. 9; TR. 55-56.

9. Southern Stoud, Inc., the contractor in this case, delivered and installed a number of widow security grilles at the Riverside, Stevens, and Hynes projects from late 1989 through June 1990. From November 21, 1989, through June 11, 1990, Respondent signed and certified, upon presentment, nine periodic estimates prepared by the contractor. GX. 10-18. The dollar amounts specified as due and owing on the nine periodic estimates corresponded exactly to the dollar amounts specified on purchase orders issued to Southern Stoud, Inc., by the Authority on April 14 and April 18, 1989. TR. 54; GX. 6-18.

10. Respondent signed the periodic estimates certifying the proper dollar amounts the Authority should pay Southern Stoud, Inc., for completed work without having reviewed the purchase orders the Authority issued to Southern Stoud, Inc., and without having personally determined through on-site inspection precisely how many grilles had been installed. Respondent relied on representations made by an employee of the Authority when he signed the periodic estimates. TR. 61, 270, 282-286, 289-90.

11. From January 1990 through June 1990 Respondent made numerous visits to the housing projects to observe the progress of the security grille installations. TR. 279. He found several serious deficiencies, such as grilles that were not fitted properly to the wall and improperly installed locking devices. TR. 103-04, 184, 186-87; *See also* GX. 1, p. 8. Although Respondent orally brought these deficiencies to the attention of representatives of the Authority, he did not notify the Authority in writing of the observed deficiencies. In fact, he did not provide the Authority with written reports of any of his site inspections. GX. 1, p. 8; TR. 225.

12. Through June 30, 1990, the Authority paid Southern Stoud, Inc., a total of $596,012 for labor and materials on the window security grille project. GX. 20.

13. Between July 1990 and February 1991 the Department's Office of Inspector General ("OIG") audited the Authority's operations, including the window security grille project. TR. 12-19. On March 28, 1991, the OIG concluded that the Authority paid for grilles that had been designed and installed improperly and for grilles that it had not received. GX. 1. According to the OIG, the authority overpaid the contractor by $272,359. GX. 1, pp. 8, 21.

Subsidiary Findings and Discussion

The purpose of debarment is to protect the public interest by precluding persons who are not "responsible" from conducting business with the federal government. 24 C.F.R. § 24.115(a) *See also Agan v. Pierce,* 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Stanko Packing Co., Inc. v. Bergland,* 489 F. Supp. 947, 948-49 (D.D.C. 1980). The debarment process is not intended to punish; rather, it is designed to protect governmental interests not safeguarded by other laws. *Joseph Constr. Co. v. Veterans Admin.,* 595 F. Supp. 448, 452 (N.D. Ill. 1984). In other words, the purpose of debarment is remedial, not punitive. *See* 24 C.F.R. § 24.115.

In the context of debarment proceedings, "responsibility" is a term of art that encompasses integrity, honesty, and the general ability to conduct business lawfully. *See* 24 C.F.R. § 24.305. *See also Gonzalez v. Freeman,* 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the current risk that the government will be injured in the future by doing business with a respondent. *See Shane Meat Col., Inc. v. U.S. Dep't of Defense,* 800 F.2d 334, 338 (3rd Cir. 1986). That assessment may be based on past acts. *See Agan,* 576 F. Supp. 257; *Delta Rocky Mountain Petroleum, Inc. v. U.S. Dep't of Defense,* 726 F. Supp. 278 (D. Colo. 1989).

Respondent is Subject to Debarment Regulations

By entering into an architectural services contract with the Authority, Respondent became a "participant" and a "principal" in a "lower tier covered transaction." 24 C.F.R. §§ 24.105(m), 24.105(p) and 24.110(a)(1)(ii)(C)(11). Participants and principals in covered transactions are subject to the Department's debarment regulations. 24 C.F.R. § 24.110(a).

Cause Exists to Debar Respondent

The amended October 1988 architectural services contract between Respondent and the Authority clearly and unambiguously imposed several duties upon Respondent. Among other things, he was obligated to: (1) review the contract documents to determine the contractor's obligations to the Authority; (2) visit the work sites at least once a week during construction; (3) submit to the Authority after each visit a written report detailing any deficiencies he had observed; and (4) certify the legitimacy of the contractor's monthly periodic estimates based on his personal comparison of contract documents with on-site observations of the work completed and materials supplied by the contractor. A preponderance of the evidence shows that Respondent: (1) visited the work sites at least once a week during construction; (2) submitted oral, not written, reports to the Authority at unspecified intervals; (3) certified the contractor's monthly periodic estimates based on his on-site observations plus recommendations made by a representative of the Authority, rather than on his own comparisons of contract documents with work completed and materials supplied; and (4) reviewed contract documents *after* he had approved the

contractor's periodic estimates. In other words, Respondent approved payment of the contractor's periodic estimates without having independently determined that the contractor's claims for payment were legitimate.

Section 24.305(b)(1) of 24 C.F.R. provides that debarment may be imposed for:

> (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:
>
> (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

By failing to fulfill the duties imposed by an architectural services contract covering a CIAP-funded public housing construction project, Respondent violated the terms of a "public agreement or transaction;" that is, he violated a contract invested with the public interest. According to the OIG, Respondent's violations contributed to a $272,359 loss of CIAP funds. GX. 1. Monetary losses of this magnitude are unquestionably "so serious as to affect the integrity of an agency program" and contrary to the public interest.

In defense, Respondent contends that he has fully satisfied the standard of care required of architects under Connecticut law, the law under which his contract with the Authority is to be interpreted. He argues that he made oral rather than written reports to the Authority because that was the longstanding practice of the parties, and that when he certified the periodic estimates, he relied upon the representations of the contractor and the owner regarding the quantities of materials delivered to the work sites, pursuant to industry custom in Connecticut. He contends that a final "punch list," yet to be requested, would detail all deficiencies. He complains that the Government's interpretation of the contract imposes the duty of a "clerk of the works" upon him, a duty that industry custom imposes on a functionary of the owner. TR. 216. In any event, he argues that he should not be held accountable for the number of grilles that were delivered and installed, because the contract documents do not clearly prescribe the proper method of counting the grilles, and neither the Authority nor HUD gave him clear advice when he sought counsel.

Respondent's arguments fall wide of the mark. According to black-letter contract law, where the terms of a contract are plain and unambiguous, as here, the contract is conclusive. 17A C.J.S. *Contracts* § 296(1). A related rule provides that the meaning of a contract must be determined from the four corners of the instrument. 17A C.J.S. *Contracts* § 296(2). Respondent and the Authority adopted this rule in Article 10.3 of their agreement which provides:

> This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or

> agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and the Architect.

The parties never amended their agreement with a written instrument. Therefore, no credit can be given to Respondent's contention that the parties had agreed through longstanding practice to oral rather than written reports. Nor did the parties agree in writing to conform their conduct with industry custom if custom differed from contractual requirements. In any case, the evidence does not show that it is industry custom for Connecticut architects to ignore clearly imposed contract duties when the contract concerns construction projects for public housing authorities. The evidence regarding industry custom addressed the *general* practice of Connecticut architects under *ordinary* construction contracts, not the general practice of Connecticut architects under the HUD-imposed "Standard Form of Agreement between Owner and Architect" (GX. 21) that is the subject of this case.[2] That agreement clearly requires an architect to perform duties that Respondent claims should be performed by a "clerk of the works." Finally, given the contractual duty to "guard the Owner against defects and deficiencies," it was irresponsible of Respondent to certify the periodic estimates while there was any confusion concerning the proper method of counting the grilles. He should have refused to do so until the issue was resolved.

Respondent's argument to the contrary notwithstanding, a final punch list would not be an acceptable substitute for the required weekly written reports. Respondent was charged with discovering, reporting, and guarding against deficiencies as they occurred, not months or years later. A punch list would come much too late to prevent the damage that has been sustained by the public fisc in the instant case. Furthermore, weekly written reports from the architect during construction demonstrate who knew what when. They are required, in part, because they help establish accountability for everyone connected with projects financed with public funds. That is, they are required because they help protect the public interest.

Respondent is a highly educated man with many decades of professional experience, yet he failed to perform the duties clearly and unambiguously prescribed in his contract with the Authority and in the nine periodic estimates that he certified. He either read those documents, knew his duties but chose to ignore them, or he signed those documents without reading or understanding their contents, in reckless disregard of the duties they imposed. It is unreasonable and irresponsible for an experienced professional to sign official documents without knowing their contents. The record does not prove that Respondent knowingly failed to perform his duties; nevertheless, he must be considered to have acted willfully. Conduct is "willful" when "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow . . . ." *Prosser and Keeton on the Law of*

[2]Moreover, Respondent's expert witness testified that according to industry practice, deficiencies observed by an architect would be reported to the owner in writing. TR. 347-48.

Torts at 213, 5th ed., West Publishing Co. (1984). "Willful" behavior must be distinguished from "mere mistake resulting from inexperience, excitement or confusion, and . . . mere thoughtlessness or inadvertence, or simple inattention." *Id.* at 214. Respondent did not commit mere mistakes or inadvertent errors.

Even if Respondent's conduct were not deemed willful, his failure to fulfill his contractual duties nevertheless would constitute cause for debarment, because that conduct falls within the proscriptions of 24 C.F.R. § 24.305(f) as a "material violation of a . . . program requirement applicable to a public agreement or transaction . . . ." The certifications in the periodic estimates are "program requirement[s] applicable to a public agreement or transaction . . . ." Willfulness is not an element of a § 24.305(f) violation. Accordingly, the Government has satisfied its burden to prove cause for debarment.[3]

However, a debarment cannot stand simply and solely on evidence sufficient to establish cause for debarment. Debarment is discretionary. It is therefore necessary to consider what the evidence shows about the seriousness of Respondent's conduct, as well as any evidence in mitigation. *See* 24 C.F.R. § 24.115(d).

As shown *supra,* the record indicates that Respondent's conduct contributed to a significant monetary loss to the Government. Conduct contributing to a significant monetary loss is sufficiently serious to merit debarment, but the circumstances of Respondent's violations will not support the Government's request that Respondent be debarred for three years.

At the time of the hearing, Respondent was 81 years old. He testified that he has been involved with housing projects using federal funds "since the passage of the 1938 Housing Bill." (TR. 166-67)[4] For more than 30 years Respondent has been providing architectural services to the Authority, some of it free of charge. TR. 167, 169-70. His record had been spotless until this case.

Respondent was not primarily responsible for the Government's loss on the window security grille project. The OIG report in the record demonstrates that the Authority was grossly mismanaged during the grille project, and that primary responsibility for the Government's loss must be laid at the feet of the Authority. The OIG:

> found complete breakdowns in the PHA's system of internal controls for the purchase and installation of security grilles and the administration of the architect's contract . . . . It is the PHA's

[3]In light of this conclusion, it is unnecessary to address the Government's argument that Respondent's conduct also violated 24 C.F.R. § 24.305(d).

[4]Respondent presumably was referring to the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*

> responsibility to assure that the inspection, payment, and all other administrative matters concerning the purchase are handled by the PHA and the contractor. This was not done. The PHA failed in carrying out their responsibilities by paying for materials not received or installed, and not monitoring construction progress. Consequently, the PHA overpaid $272,359 for security grilles.

GX. 1, p. iii. The OIG recommended that HUD impose administrative sanctions against responsible Authority staff, the contractor, Respondent, and the Authority's Board of Commissioners. That a large share of the responsibility for the Government's loss lies with others reduces the seriousness of Respondent's conduct.

Beyond his negotiated fee, Respondent did not profit from the window security grille project. The record does not show that he acted with intent to defraud, or that he was an accomplice to a criminal enterprise. On the contrary, Respondent appears to be a forthright person of high personal integrity who, for unknown reasons, was grossly negligent in the performance of his contractual duties in this case. If in the future Respondent engages in business affecting the Government, I think it very likely that he will exercise the greatest possible care to ensure that he faithfully performs all of his contractual obligations. Considering the record as a whole, I conclude that debarment for a period of 18 months is commensurate with the seriousness of Respondent's conduct and appropriate under the circumstances.[5]

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Respondent Sebastian J. Passanesi from participating in covered transactions as either a participant or a principal at HUD and throughout the Executive Branch of the Federal Government, and from participating in procurement contracts at HUD for a period of 18 months beginning June 28, 1991.

THOMAS C. HEINZ
Administrative Law Judge

[5]Inasmuch as Respondent's debarment dates from June 28, 1991, it is unnecessary to address his argument that his suspension on that date was unlawful. The issue is moot.

CERTIFICATION OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by THOMAS C. HEINZ, Administrative Law Judge, HUDALJ 92-1835-DB, were sent to the following parties on this 16th day of December, 1992, in the manner indicated:

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